Supreme Court, U.S.
FILED
JUN 17 1993
OFFICE OF THE CLERK

No. 91-1950

IN THE

Supreme Court of the United States

OCTOBER TERM 1992

AMERICAN DREDGING COMPANY,

Petitioner,

—v.—

WILLIAM ROBERT MILLER,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

LIZABETH L. BURRELL
Counsel of Record
GEORGE W. HEALY, III
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
Attorneys for the Maritime Law Association of the United States, Amicus Curiae

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QUESTION OF LAW PRESENTED

Whether the doctrine of *forum non conveniens* as applied by the federal courts in admiralty cases must be applied to maritime claims filed in state courts.

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONER

The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioner, American Dredging Company ("Petitioner"). Both Petitioner and Respondent have consented to the MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899 and incorporated in 1993. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, *to promote uniformity in its enactment and interpretation*, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

(Emphasis added.)

In furtherance of these objectives MLA, during the ninety-three years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] The

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1 46 U.S.C. §§ 1300-1315.

2 9 U.S.C. §§ 1-16.

MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

MLA is also participating in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its Commissions on Trade Law ("UNCITRAL") and Trade and Development ("UNCTAD"). It works closely with the International Maritime Organization ("IMO").

MLA has actively participated, as one of some fifty national maritime law associations constituting the Comité Maritime International,[4] in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.[5]

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3 *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993) (hereinafter "BENEDICT"), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

4 These now include the national associations of Argentina, Australia and New Zealand, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechoslovakia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, D.P.R. Korea, Mexico, Morocco, The Netherlands, Nigeria, Norway, Panama, Peru, Philippines, Poland, Portugal, Russian Federation, Senegal, Singapore, Spain, Sri Lanka, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay and Venezuela.

5 *E.g.*, Assistance and Salvage (1910), 37 Stat. 1658 (1913), *reprinted in* 6 BENEDICT, Doc. No. 4-1; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, *reprinted in* 6 BENEDICT, Doc. No. 1-1; Collision (1910), *reprinted in* 6 BENEDICT, Doc. No. 3-2; Limitation of Liability of Owners of Sea-Going Ships (1957), *reprinted in* 6 BENEDICT, Doc. No. 5-2; Maritime Liens and Mortgages (1967), *reprinted in* 6C BENEDICT, Doc. No. 15-5; Civil Liability for Oil Pollution Damages (1969), U.N.T.S. 1409, *reprinted in* 6 BENEDICT, Doc. No. 6-3; and Limitation of Liability for Maritime Claims (1976), *reprinted in* 6 BENEDICT, Doc. No. 5-4.

MLA believes uniformity in maritime law, both national and international, is essential. Concern for uniformity has been repeatedly expressed by our membership and standing committees. For example, in 1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[6] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution.[7]

MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.[8]

It is also the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law.

Such a situation exists in this case. Application of state open-forum statutes to maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. The Louisiana court's holding also perpetuates the now chronic conflict between Louisiana and Texas

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6 MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

7 MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

8 *E.g.*, *Sisson v. Ruby*, 497 U.S. 358 (1990); *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

State Courts and the United States Court of Appeals for the Fifth Circuit.

Apart from the inherent problems arising from uncertainty in the application of a federal door-closing measure, there is the risk that state courts will disregard other elements of admiralty law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, 61 U.S.L.W. 3256 (1992) (applying state strict liability statute to maritime tort). Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and consequently the practices of MLA's attorney members and the affairs of their clients.

SUMMARY OF ARGUMENT

The doctrine of *forum non conveniens* is a necessary corollary to the extraordinary scope of the admiralty jurisdiction. Allowing States to abolish the maritime doctrine of *forum non conveniens* in maritime actions brought in state courts fundamentally prejudices the rights of all maritime defendants and violates the constitutional requirement of uniform treatment of maritime claims. Condoning the result reached by the Louisiana Supreme Court would also encourage federal courts, which might otherwise remand or stay their own proceedings, to retain jurisdiction to preserve the rights of maritime defendants, further burdening the federal system. States are without power to alter the characteristic features of maritime law. *Forum non conveniens*, whether it is deemed substantive or procedural, is a characteristic feature of the general maritime law, and its application is mandated regardless of the court in which the claim is brought. Inconsistency in the availability of a *forum non conveniens* defense adversely affects international as well as American interests. Finally, by allowing the decision to stand, this Court would be endorsing forum shopping of the rankest order.

ARGUMENT

I

THE DOCTRINE OF *FORUM NON CONVENIENS* IS A NECESSARY COROLLARY TO THE SCOPE OF MARITIME JURISDICTION AND ITS ABROGATION MATERIALLY IMPAIRS THE RIGHTS OF THE PARTIES AND THE EFFICIENCY OF THE FEDERAL COURTS.

The doctrine of *forum non conveniens* was developed in response to the exceptional scope of the maritime jurisdiction: In view of the plethora of fora in which maritime defendants may be found subject to jurisdiction, a counterbalancing limitation on the exercise of that jurisdiction was necessary to avoid impositions on the courts and the parties. *Alcoa Steamship Co. v. M/V NORDIC REGENT*, 654 F.2d 147, 154 (2d Cir.), *cert. denied*, 449 U.S. 890 (1980).

It is indeed essential to preserve the scope of maritime defendants' exposure to jurisdiction wherever they may be found in order to allow the enforcement of valid claims against necessarily peripatetic maritime actors. It is, however, equally essential to preserve the vitality of the concomitant doctrine that allows the actual preparation and trial of a case to go forward in the most appropriate forum.

Without reversal by this Court, this and other maritime defendants will continue to be prejudiced by Louisiana's refusal to apply the *forum non conveniens* doctrine.[9] Having to

[9] The Louisiana statute grants *forum non conveniens* relief to non-maritime defendants. LA. CODE CIV. PROC. ANN. art. 123(A)-(C) (West Supp. 1992). Under the Louisiana statute, only "claims brought pursuant to [the Jones Act,] 46 [U.S.C. App.] § 688 or federal maritime law" are ineligible for *forum non conveniens* dismissal. LA. CODE CIV. PROC. ANN. art. 123(C). Maritime defendants are thus singled out and doubly disadvantaged in being deprived of both the state and federal doctrines of *forum non conveniens*.

defend a case in a place remote from the parties, the witnesses and all the other evidence (including in the instant case the vessel on which the accident allegedly occurred), vastly increases the cost and effort of participating in legal proceedings.[10] In the case at bar, these burdens to the defendant are not even offset by any legitimate need of the plaintiff, who himself has no connection with the forum, unless, of course, the cost of defending a case in a distant location encourages the defendant to pay more in settlement to avoid inordinate expenses.

Although their burden is not so immediately apparent, the federal courts will also continue to suffer if the decision below stands. For example, in *Ikospentakis v. Thelassic Steamship Agency*, 915 F.2d 176, 180 (5th Cir. 1990), the Fifth Circuit refused to allow a voluntary dismissal of a federal action because the plaintiff then would have proceeded in a state court in which the doctrine of *forum non conveniens* would not be applied, stating:

> That the [*forum non conveniens*] defense is available to [defendants] and that it would be "stripped" from them in Louisiana state court, albeit in violation of the constitution's supremacy clause, are equally certain propositions. . . .
>
> . . . At some point, Louisiana must bend to the federal courts' construction of federal law. However, to insist that these foreign appellants become guinea pigs in an effort to overturn Louisiana's erroneous rule would blink at reality

[10] Increased cost and the possibility of not having access to essential evidence—for example, the vessel on which plaintiff was allegedly injured—may not be the only prejudice suffered by maritime defendants deprived of recourse to the *forum non conveniens* doctrine. While in theory any court is required to apply the same federal maritime rules to the merits of the claim, state courts have been known to substitute state substantive rules for established maritime law. *See, e.g., Green v. Industrial Helicopters, Inc.*, 593 So.2d 634 (La.), *cert. denied*, 61 U.S.L.W. 3256 (1992) (applying state strict liability statute to maritime tort). The defendant here is exposed to that risk as well.

> and would needlessly subject them to considerable expense as well as legal prejudice for the sake of vindicating principle. We need not reach such an unjust result.

Id. at 178, 180. The Fifth Circuit's willingness to accept a burden on its docket in lieu of unjustly burdening a litigant is a laudable illustration of that court's allegiance to justice, but these burdens on courts and litigants need not exist if maritime litigants could expect to receive the same treatment in state court as they would in federal court, as required by the Constitution. *See* Points II-IV, *infra* at 9-17; n.10, *supra* at 7. Unfortunately, such treatment cannot be expected if the States are free to circumvent the doctrine of *forum non conveniens* in maritime actions.

A further detriment to United States courts would result from a confirmation of the conflict between the state and federal courts[11] on the applicability of *forum non conveniens*: The forum shopping necessarily attendant to the conflict will continue to engender the wasteful procedural jockeying that has already consumed an inordinate amount of judicial time and attention. *See, e.g., Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988), *appeal after remand*, 821 S.W.2d 190 (Tex. App. 14th Dist. 1991), *writ granted*, 35 Tex. Sup. Ct. J. 684 (1992).

There is a grave need for uniform application of the *forum non conveniens* doctrine in maritime cases because of the number of fora in which maritime defendants may be jurisdictionally "found." The prejudice and costs of engaging in a long-distance defense in a state court are as great as these burdens would be in an inconvenient federal court, and there is no justification for withholding the relief which federal law grants to maritime defendants and which even Louisiana allows to all nonmaritime defendants.

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[11] For discussion of the conflict, see, *e.g., Ikospentakis*, 915 F.2d 176; *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374 (5th Cir. 1988).

II

UNDER THE CONSTITUTION, THE STATES LACK POWER TO ALTER CHARACTERISTIC FEATURES OF THE FEDERAL MARITIME LAW.

The number of places in which a maritime defendant may be legitimately haled into court was taken into account not only in the development of the *forum non conveniens* doctrine, but also, first and foremost, in the Constitution's allocation of powers between the state and federal governments. Because maritime activity would be chaotic without uniformity and reliability in the governing law, the Constitution places maritime law and jurisdiction in the hands of the national government, the Admiralty Clause mandating that "all Cases of admiralty and maritime Jurisdiction" fall to the "judicial Power of the United States," U.S. CONST., art. III, § 2, cl. 3, and the Commerce Clause assigning to the national legislature "the power . . . To regulate commerce with foreign Nations, and among the several States . . . ." U.S. CONST., art. I, § 8, cl. 3. Both clauses speak expressly in terms of "power." That these constitutional commands are dealing directly with the apportionment of competence between the state and federal governments is made clear by the Supremacy Clause, which makes the Constitution "the Supreme Law of the Land," and prescribes that "the Judges in every State shall be bound thereby, any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, § 2.

The Supreme Court's 1874 decision in *The LOTTAWANNA* explains the practical need for uniformity as the basis for the Constitution's allocation of power to the federal government for all maritime issues:

> [T]he convenience of the commercial world, bound together, as it is, by mutual relations of trade and intercourse, demands that, in all essential things wherein those

> relations bring them in contact, there should be a uniform law founded on natural reason and justice. . . .
>
> One thing, however is unquestionable: The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intent to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

88 U.S. (21 Wall.) 558, 575 (1875).

This Court has repeatedly stressed that "national control" is a constitutional requirement with consequent limitations on state power:

> [The Constitution] *took from the States all power*, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, *characteristic features* of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and *bring them within control of the Federal Government was the fundamental purpose* . . . .

Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 160 (1920) (emphasis added).

In *Testa v. Katt*, 330 U.S. 386 (1947), the United States Supreme Court held that state courts which lacked jurisdiction under state law to hear federal claims could be required by federal law to hear them nonetheless. Conversely, a state legislature lacks power to keep state courts open to hear claims for which they have been deprived of jurisdiction by federal law. *See The MOSES TAYLOR*, 71 U.S. (4 Wall.) 411 (1867); *The*

HINE v. Trevor, 71 U.S. (4 Wall.) 555 (1867); *Lindgren v. United States*, 281 U.S. 38, 47 (1930); *Southland v. Keating*, 465 U.S. 1, 15-16 (1984).

Neither courts nor legislatures can confer a power on the States which is denied to them in the Constitution, and the Constitution's requirement of national uniformity in maritime cases deprives the States of the power to interfere with the characteristic features of maritime law or to impair national uniformity in suits within the admiralty jurisdiction.

III

THE DOCTRINE OF *FORUM NON CONVENIENS* IS A "CHARACTERISTIC FEATURE" OF THE MARITIME LAW WHICH MUST BE APPLIED IN ALL MARITIME CASES.

The concept of uniformity involves the issue of competence in a federalist system and, as is the case with all such fundamental issues, is difficult to define once and for all. *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917). Still, it is clear that

> no [state] legislation is valid if it . . . works material prejudice to the *characteristic features* of maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.

Id. (emphasis added).

The doctrine of *forum non conveniens* has been specifically held to be a "characteristic feature" of the maritime law. *Ikospentakis*, 915 F.2d at 178 ("This court has recognized that *forum non conveniens* is a 'characteristic feature' of maritime

law, tracing its history back to the earliest decisions of the federal courts."). *Accord*, *Exxon*, 817 F.2d at 318, 323-24. ("The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law."). This Court's first enunciation of the doctrine was in an admiralty suit. *Canada Malting Co. v. Paterson Co.*, 285 U.S. 413 (1932). Admiralty and maritime law is the "source" of the *forum non conveniens* doctrine and "it is in the field of admiralty that our federal courts have applied the doctrine of *forum non conveniens* most flexibly and over the longest period of time." *Alcoa*, 654 F.2d at 154, 153. In addition to its origin and venerable 190-year history in maritime courts, *see Willendson v. Forsoket*, 29 F. Cas. 1283 (D. Pa. 1801) (No. 17,682), the breadth of the doctrine's application to cases in all substantive areas of maritime law illustrates its place as an integral feature of the maritime law of the United States. *See, e.g., Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386 (1949) (salvage); *Tramp Oil v. MERMAID I*, 743 F.2d 48, 1985 AMC 459 (1st Cir. 1984) (maritime lien); *Calavo Growers of California v. Generali Belgium*, 632 F.2d 963, 1980 AMC 1993 (2d Cir. 1980), *cert. denied*, 449 U.S. 1084 (1981) (breach of marine insurance contract); *The WILJA*, 113 F.2d 646 (2d. Cir.), *cert. denied sub nom. O/Y Wipu v. Dreyfus*, 311 U.S. 687 (1940) (breach of charter party); *Ocean Shelf Trading v. Flota Mercante Grancolumbiana*, 638 F. Supp. 249, 1986 AMC 2482 (S.D.N.Y. 1986) (collision); *Matson Navigation Co. v. Stal-Laval Turbin AB*, 609 F. Supp. 579, 1985 AMC 2381 (N.D. Cal. 1985) (products liability for negligent design of ship's engine); *Red Sea Insurance v. S.S. LUCIA DEL MAR*, 1983 AMC 1630 (S.D.N.Y. 1982), *aff'd*, 1983 AMC 1631 (2d Cir. 1983) (cargo loss); *Argyll Shipping Co. v. Hanover Insurance Co.*, 297 F. Supp. 125 (S.D.N.Y. 1968) (general average); *Wall Street Traders Inc. v. Sociedad Espanola de Construccion Naval*, 245 F. Supp. 344 (S.D.N.Y. 1964) (breach of ship conversion contract); *Galban Lobo Trading Co. v. Canadian Leader Ltd.*, 1963 AMC 988 (S.D.N.Y. 1958) (breach of contract of carriage).

In arguing, contrary to federal circuit court authority, that *forum non conveniens* is not "characteristic" of the maritime law because other bodies of law have also adopted the doctrine, *see* Brief for the United States as *Amicus Curiae* (opposing the Petition for Certiorari) at 11-12, the Solicitor General has confused "characteristic" with "exclusive." Certain features of maritime law are indeed exclusive, such as the exercise of *in rem* jurisdiction over vessels, *see, e.g., The MOSES TAYLOR*, 71 U.S. 411, but the borrowing and eventual incorporation of traditional maritime tenets into other bodies of law, both state and federal, does not deprive such tenets of their status as characteristic features of maritime law. For example, comparative negligence has long been a characteristic feature of maritime law, *see, e.g., Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953), and the fact that state law, in the main, has now moved to this position from a contributory negligence framework, does not alter comparative negligence's status as a characteristic feature of maritime law. The rules associated with unseaworthiness may have been the first form of strict liability, which has now become part of the fabric of our state and national laws. Similarly, the current acceptance by many of the States—including Louisiana in all nonmaritime cases, LA. CODE CIV. PROC. ANN. art. 123(A)(B)—of the doctrine of *forum non conveniens* does not alter its status as a characteristic feature of maritime law, especially since the doctrine has its source in maritime law. *See Alcoa*, 654 F.2d at 153-54.

Because the doctrine of *forum non conveniens* is a characteristic feature of maritime law, it should be applied in all maritime cases, regardless of the court in which the action is brought, in order to preserve the uniformity and harmony mandated by the Constitution. A "preemption" analysis is insufficient: The Constitution prevents the States from impairing uniformity *or* modifying or withholding characteristic features of maritime law, even if the federal law does not expressly declare itself to be preemptive. *Forum non conveniens*, being so intimately connected with admiralty jurisdiction itself, is

one of the characteristic features of maritime law in which uniformity is essential, and in which state interference would work great harm. Accordingly, the decision below must be reversed.

IV

APPLICATION OF THE *FORUM NON CONVENIENS* DOCTRINE CANNOT BE AVOIDED BY CHARACTERIZING IT AS "PROCEDURAL."

To say that the principle of uniformity ought to be limited to "substance" and denied to "procedure" does not resolve the question here.

The importance of federal control of all aspects of maritime cases was the basis for the Court's decision in *Panama Railroad Co. v. Johnson*:

> The framers of the Constitution were familiar with that [admiralty] system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but *to place the entire subject*—its substantive as well as *its procedural features—under national control* . . . .

264 U.S. 375, 386 (1924) (emphasis added).

State "procedural" rules have been expressly rejected in maritime cases, even when the suit has been brought in state court. *See, e.g., Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). In *Garrett*, a case brought in the Pennsylvania state courts, this Court ruled that the federal maritime rather than state rule must govern on a burden of proof issue:

> The source of the governing law applied is in the national, not the state, government. If by its practice the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the State would not enforce, but would actually deny federal rights . . . .

* * *

> The right of petitioner to be free from the burden of proof imposed by the Pennsylvania local rule inhered in his cause of action. Deeply rooted as that right is, it was part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.

Id. at 245, 249. In many maritime cases, procedure is as important as substantive law.

This Court has rejected the use of the epithet "procedural" as a means of deciding cases:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same key words to very different problems. Neither "substance" nor "procedure" represents the same invariants. Each implies different variables depending upon the particular problem for which is used.

Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

In *Hanna v. Plumer*, 380 U.S. 460 (1965), the Court reaffirmed its view that the dichotomy between "substance" and "procedure" was not adequate for deciding cases, while making clear that the criterion of "outcome-determination" is also not a universal rule.

In both *Guaranty Trust* and *Hanna*, the Court stressed the discouragement of forum-shopping as a ground for looking beyond the common epithets in deciding whether federal or state standards should be applied. Both cases indicate that the disparaging adjective "procedural" should not be used to reject a doctrine that is characteristic of the maritime law which governs this case.

Arguments based on the treatment of procedural issues in *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1

(1950), and *Bainbridge v. Merchants & Miners Transportation Co.*, 287 U.S. 278 (1932), simply miss the point. In interpreting the Federal Employers' Liability Act, the Court held in *Mayfield* only that a state court may choose not to exercise the jurisdiction granted to it by FELA as long as the court does so in an even-handed manner.[12] 340 U.S. at 4. No element of the Jones Act or the maritime law was at issue, and nothing in *Mayfield* or subsequent federal court decisions indicates that the Jones Act's incorporation of some of FELA's remedial provisions permits the rejection of *forum non conveniens* in Jones Act cases.[13] Of course, whether or not it is appropriate to analogize from FELA to the Jones Act, *Mayfield* cannot save the result below because the Louisiana statute abolishes the *forum non conveniens* doctrine in *all* maritime cases, not just those arising under the Jones Act, LA. CODE CIV. PROC. ANN. art. 123(C), and the plaintiff here has claimed under both the Jones Act *and the general maritime law*. Brief for the United States

[12] Only maritime litigants are deprived of the *forum non conveniens* doctrine incorporated in the Lousiana statute.

[13] The relevant portion of the Jones Act states only:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.

46 U.S.C. App. § 688. That the Jones Act bestows on seaman, in addition to their general maritime law, the supplementary rights and remedies conferred by "statutes of the United States" on railway employees in no way supports the argument that FELA-generated law should substituted for the law which has been established over the years specifically for Jones Act and general maritime law cases.

as *Amicus Curiae* at 3. Neither *Mayfield* nor any other precedent substitutes decisions interpreting FELA for well-established rules in a body of law which preexisted FELA by centuries, and in which the need for national uniformity is constitutionally established.

That the Louisiana statute purports to preclude the application of the *forum non conveniens* doctrine to *all* maritime cases, not just Jones Act claims, also renders *Bainbridge* inapplicable. *Bainbridge* is an exercise in statutory interpretation, *see generally* 287 U.S. 278, and its limited endorsement of state venue provisions to Jones Act cases brought in state courts cannot be extended to cases involving general maritime law. Even if such extension were proper, *forum non conveniens* involves the much wider issue of *whether* the case should remain in the state in which it is brought, not which county of the state would be the venue. Because *Bainbridge* did not involve *forum non conveniens*, nothing in the decision suggests that states are free to withhold application of the doctrine in Jones Act suits. In fact, Jones Act cases may be the context in which the doctrine is most frequently invoked.

The applicability and outcome of a *forum non conveniens* analysis has a profound effect on maritime litigants: costs and availability of proof and witnesses will certainly vary, and there is a risk that even the substantive law applied may vary,[14] according to the forum in which proceedings go forward. Characterization of the doctrine as "procedural" cannot avoid its application because this Court has correctly refused to allow such epithets to control and because *forum non conveniens* is a characteristic feature of maritime law which must be given effect in all maritime cases regardless of its identification.

[14] *See* n.10, *supra* at 7.

V

ALTHOUGH THE INSTANT CASE INVOLVES UNITED STATES LITIGANTS AND FORA, ITS PRECEDENTIAL EFFECT IS INTERNATIONAL.

Issues involving the maritime jurisdiction are never bounded by any State, and while in the instant case, the appropriate alternative forum is Pennsylvania, the parties to the suit could as easily have been from Transylvania as Pennsylvania or Mississippi. The Louisiana statute does not restrict its own application to claims arising between American citizens, and if the decision below is permitted to stand, it would affect maritime defendants all over the world. Indeed, a foreign claimant asserting a claim against a Seattle-based U.S. defendant in the Louisiana state courts would be able to exert more pressure on his opponent than an American claimant who brought suit against foreign interests in a United States District Court in Louisiana. Such scenarios accord with neither the uniformity doctrine, nor the fairness litigants should be able to expect from our court system.

Foreign maritime interests are as much affected by the outcome of this case as any U.S. maritime litigants because a ruling on maritime matters affects everyone who participates in any fashion in maritime activities. The Court's recent decision in *Sisson v. Ruby*, 497 U.S. 358 (1990), teaches that the local flavor of the facts of a case does not override the national character of the jurisdiction, and that the precedents arising in one maritime context are applicable to all cases within the admiralty jurisdiction.

VI

THIS COURT SHOULD NOT ENDORSE FORUM SHOPPING.

The difference in availability of the *forum non conveniens* doctrine in state and federal courts encourages forum shopping of the rankest order with the result of burdening the defendant with the unwarranted additional litigation costs caused by having to litigate in a distant forum, even though a more convenient and appropriate forum is available. Such practices are particularly unacceptable in an area in which uniformity should reign. This Court should not sanction such abuses of a system that was constitutionally designed to promote fairness to all litigants by avoiding local variations in their rights.

CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Louisiana Supreme Court.

Dated: June 17, 1993

Respectfully submitted,

/s/ LIZABETH L. BURRELL
LIZABETH L. BURRELL
Counsel of Record

GEORGE W. HEALY, III
One Battery Park Plaza
New York, New York 10004
(212) 422-7585
Attorneys for the Maritime Law Association of the United States,
Amicus Curiae

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City of Brooklyn and the County of Kings; I am over the age of eighteen years and not a party to the within action; my business address is: One Battery Park Plaza, New York, New York 10004.

On June 17, 1993, I served the within *Amicus Curiae* Brief in Support of the Petitioner in re: "American Dredging Company v. William Robert Miller" in the United States Supreme Court, October Term 1992, No. 91-1950, on the Parties in said action by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at New York, New York, addressed as follows:

Timothy J. Falcon, Esq.,
Attorney at Law
500 Verret Street
New Orleans, Louisiana 70114-1055
Counsel of Record for Respondent

Thomas J. Wagner, Esq.
Wagner & Bagot
336 Camp Street
C & R Building, Suite 250
New Orleans, Louisiana 70130-2804
Counsel of Record for Petitioner

All Parties required to be served have been served.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on June 17, 1993 at New York, New York.

LIZABETH L. BURRELL
Lizabeth L. Burrell